INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 790

R. R. DONNELLEY & SONS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (B. A. 532–542)[1] is reported in 156 F. 2d 416. The findings of fact, conclusions of law, and order of the National Labor Relations Board (P. A. 50–63b, 974–1103) are reported in 40 N. L. R. B. 635.

[1] The record in this Court consists of the appendices to the briefs in the court below (herein designated as "P. A." for petitioner's appendix and "B. A." for Board's appendix), with the addition of the proceedings in the court below, which have been inserted at the end of the Board's appendix and are herein designated also as "B. A." Occasional references to the typewritten transcript of the proceedings before the Board and to Board Exhibits, on file with this Court, are designated "Tr." and "Bd. Exh.", respectively.

JURISDICTION

The decree of the court below (B. A. 575–579) was entered on September 11, 1946. On December 10, 1946, the time for filing the petition for a writ of certiorari was extended to December 18, 1946 (B. A. 583). The petition for certiorari was filed on December 17, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the Board's findings, sustained by the court below, that petitioner engaged in a course of anti-union conduct which included, among other things, threatening employees that they would suffer an economic loss if they joined a union, questioning employees and maintaining a system of surveillance and reports with respect to their union activities, instructing foremen to participate in petitioner's campaign of opposition to the union, and discriminatorily demoting employee West, in violation of Section 8 (1) and (3) of the National Labor Relations Act.

2. Whether the portion of the Board's order, which directed petitioner to cease and desist from instructing its foremen and supervisors to make statements to its employees concerning labor organization which transgress the provisions of the Act, was void for uncertainty.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 28.

STATEMENT

Upon the usual proceedings under Section 10 of the Act (P. A. 50, 974–976), the Board, on February 17, 1945, issued its findings of fact, conclusions of law and order (P. A. 50–63b, 974–1103). The facts as found by the Board and as shown by the evidence may be summarized as follows:[2]

Prior to 1907, the petitioner had contractual relations with several of the printing trade unions (P. A. 980; B. A. 34, 36–37, Tr. 98, Bd. Exh. 22). The last of these agreements was broken off in 1907 and from that date until the enactment of the National Industrial Recovery Act in 1933,[3] petitioner maintained an "open shop" or "closed non-union shop;" that is, petitioner refused to hire or retain in its employ any worker who became affiliated with a union (P. A. 980–981; B. A. 34–38). During most of this period petitioner made substantial use of the "yellow-dog" contract (P. A. 981–982; B. A. 41, Tr. 318, Bd. Exh. 34, 35), employment application blanks requiring a warranty by the applicant that he did not belong to a labor organization (P. A.

[2] In the following statement, the references preceding the semicolons are to the Board's findings including the portions of the intermediate report which were adopted by the Board (P. A. 50), and succeeding references are to the supporting evidence.

[3] 48 Stat. 195.

981–982; B. A. 41, Tr. 340, Bd. Exh. 36), and inquiry forms requesting former employers to furnish information with respect to the applicant's possible union affiliation (P. A. 982; 104–105, 962, Tr. 347). Petitioner's president, T. E. Donnelley (P. A. 979; Tr. 252), was prominently identified with anti-union employer associations during this period and petitioner publicly advertised its "open shop" policy (P. A. 982–983; B. A. 38, Tr. 283–286, 291, 292, 293, 294, 361, Bd. Exhs. 23 through 26, 39). Petitioner reminded its employees of its "closed non-union shop" policy by printed communications from petitioner's officials to its employees (P. A. 983–984; B. A. 343–344, 509–515, P. A. 108–110, 114, Tr. 400) stating, for example, that "we will continue to operate this plant non-union * * *. We run non-union or not at all" (P. A. 983–984; B. A. 510, 512), and "if [the employees] * * * join the union they would be through here forever" (P. A. 984; B. A. 512).

After enactment of the National Industrial Recovery Act in 1933, petitioner, on August 4, 1933, signed the President's Reemployment Agreement (P. A. 984–985; 942–946, Tr. 2345) which embraced compliance with Section 7 (a) of that Act[4] guaranteeing employees freedom of self-organization and collective bargaining rights. Petitioner's president, T. E. Donnelley, addressing the employees at about this time, stated that while any of petitioner's employees "had a perfect right to become

[4] 48 Stat. 198–199.

a union man or non-union man, as he wished, and there would be no discrimination * * * it would serve better for them to stay non-union, because * * * we could pay them more money and our relations would be very much pleasanter and less controversial * * * if all the grievances were handled direct man to man * * *" (P. A. 985–986; 159–160, 162).

At about this same time petitioner's vice-president, C. G. Littell (P. A. 979, 989; 946, Tr. 2345), in a speech to the employees, assured them that they now had a "right to organize," but that "in this particular business we are very much opposed to unionization," that while a union might be useful "where sweat shop conditions obtain, * * * even then, unfortunately, the employees frequently find that by unionizing they have simply transferred from a rapacious employer to a robber, racketeer, and murderer * * *" (P. A. 986–987; B. A. 517–518, Tr. 401), that the "most important part of all unions is dues. That is what makes the wheels run, makes jobs for the organizer, business agent, etc.," who "try to show how busy they are by making trouble between you and your employer * * *" (P. A. 987; B. A. 520). Littell further warned the employees that there "could be no bonus system in union shops or other recognition of unusual endeavor * * *" (P. A. 987–988; B. A. 520, 521).

On December 8, 1933, Vice-president Littell, in letters sent to certain employees, stated, in part, that the unions were seeking to "take advantage of

the N. R. A. to try to get all shops unionized and all printers paying dues" (P. A. 988; B. A. 523–526, Tr. 403). Littell concluded, "I have said right along, and I say it again, with due consideration of the situation at the present time, that the unions have nothing to offer the employees of R. R. Donnelley & Sons Company" (P. A. 988; B. A. 526). Except for the above-mentioned two speeches of Donnelley and Littell and the December 8 letter of Littell the record contains no evidence that petitioner made any statements to its employees to indicate a change in its policies towards unions and labor-management relations, from the time of the enactment of the Recovery Act to the time when this Court upheld the constitutionality of the National Labor Relations Act in April 1937 (P. A. 989).[5]

Within two days after this Court's decision sustaining the constitutionality of the National Labor Relations Act, petitioner, in frank anticipation of a drive by unions to organize its plant (P. A. 51, 992; 971), undertook to explain the application of the Act to its plant, within the meaning of the Court's decision (P. A. 989, 992; 964, 971, Tr. 404, 406, 665), by an article published by Littell in petitioner's company-owned newspaper (P. A. 51, 989; 964–970, Tr. 404), and a letter dated April 14, 1937 (P. A. 51, 989, 992; 971–972, Tr. 406). The latter was addressed to petitioner's employees and was signed by Donnelley and Littell (P. A. 51, 992;

[5] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

971–972), who by this time had become petitioner's chairman and president, respectively (P. A. 979; 972). These documents stated that the employees had the "right to organize" but that, at the same time, even where a bargaining representative had been selected by a majority of the employees in an appropriate unit *"those employees in such unit as wish to deal with their employer individually may do so under the Act, and the employer may enter into an individual contract with them concerning wages, hours and other conditions of employment"* (P. A. 990, 992; 964, 971, Tr. 404, 406) [Italics in original]. The news article further represented the Act as an ineffective piece of legislation which could not compel an employer to enter into any agreement, declaring that "You can lead a horse to water but you can't make him drink" (P. A. 51, 991; 966).

The balance of the Littell article and the April 14 letter was devoted to a restatement of petitioner's unremitting opposition to any union in its plant (P. A. 992–994, 1000–1001; compare B. A. 512–526 with P. A. 964–972, Tr. 400, 401, 403). Thus, petitioner depicted union leaders as "outside agitators" who "must still act *as if* they had a real interest in the welfare of the working man" (P. A. 993; 970, italics supplied) but who were in reality an "outside interference" which must be kept out of the plant if the best interests of the Company and the employees were to be served (P. A. 993;

972). Declaring that "For more than thirty years we have maintained the right of any individual to work in this plant without paying dues or obtaining permission from an outside organization * * *" (P. A. 993; 972), petitioner warned its employees that if the plant were unionized "we would have to discontinue our bonus system" because unions "forbid any arrangements that differentiate between workers," and that petitioner would no longer be able to reward by promotion an employee "who showed merit" but "would have to take somebody from the union * * * maybe a much poorer man that the one we wished to promote" (P. A. 1001; 968). Petitioner cautioned its employees that a "change will give you no more mony or better working conditions," but would "add much uncertainty to your employment" because the employees "would be subjected to an outside labor leader who might issue a strike order at any time for matters entirely unconcerned with your employment here" (P. A. 1000; 967).

Neither the letter nor the article mentioned the protection afforded employees by the National Labor Relations Act through its proscription of unfair labor practices (P. A. 51). Petitioner thereby imparted to the employees a misleading and erroneous construction of the Act, which it never corrected (P. A. 51). By interpreting the Supreme Court's opinion in an unfair and distorted manner petitioner sought to, and did, leave the employees with the impression that the Act in practical appli-

cation was meaningless and that therefore it was to their best interest not to organize (P. A. 51).

In 1938, various Chicago locals affiliated with the American Federation of Labor formed an Organization Committee, hereinafter referred to as the Union, for the purpose of organizing petitioner's employees (P. A. 977–978; B. A. 2–7, P. A. 65–66). The Union's organizing drive developed into an aggressive movement during the summer of 1942 and continued to the time of the hearing herein (P. A. 1002–1003; B. A. 2–5, 6–7, 58–60, 110–111, 134–135, 187, 190–191, 205, 224–225, 278–279, 357–358, P. A. 454–455), and petitioner timed an intensification of its counter-campaign to meet it (P. A. 50–51, 1002–1004). During this period petitioner assailed its employees with numerous anti-union speeches and printed statements which were reiterations of the statements issued by petitioner in 1937 (*supra*, pp. 6–8) (P. A. 989–990, 1003–1005; 76–94, 196–197, 954–956, 960–961, B. A. 20–21, 37–38, Tr. 305–308).

Six of these speeches were delivered by Plant Superintendent Busby (P. A. 986, 990; 79–90, 268–269) who, in addition, frequently spent several hours a day in various departments suspected of being highly unionized (P. A. 990, 1003–1006; 276–279, 354, 380–381, 411–412, B. A. 87–90, 106–108, 110–111, 181–182, 189, 190–191, 278–279, 358), "running from one to another" of the employees and talking against joining the Union (P. A. 1005–1006; B. A. 87–90, 106–108, 158–166, 181–182, 189, 190–191, 193–

200, 208–209, 212–215).[6] Department Manager Flexman (P. A. 986; 456–457), in order "to make up their minds for them," called his employees to his office in a series of small groups and told them that the chief result of unionization would be less work for them and lay-offs during slack seasons (P. A. 1015; 462–464, B. A. 219–221, 224–228, 252–254, 281–284).

In the course of its counter-campaign, petitioner threatened to retaliate against employees for supporting the Union. Superintendent Busby, in November 1942, warned a known union-member employee that once he went on strike, he "was no longer an employee of Donnelley's" (P. A. 1009–1010; B. A. 162, 164–165). In March 1943, Department Manager Flexman warned Employee Caldwell that certain publicity concerning his union activities had made him a "marked man" and that he would probably not in the future receive the "responsibility" that he deserved (P. A. 1017; B. A. 239–240), but that he could "redeem" himself by resigning from his position on the Union Council (P. A. 1017; B. A. 245). Flexman cited the example of Foreman Anderson, who had recently been retired by petitioner on a pension, and said that petitioner "appreciated and rewarded loyalty in their employees" (P. A. 1017–1018; B. A. 240). During this same conversa-

[6] As a result of Superintendent Busby's conspicuous anti-union activities in the plant, the employees developed as a "password" among themselves the query, "Has Busby punched in yet?" (B. A. 197).

tion, Flexman, by contrast, asked Caldwell what he "thought of [Foreman] West and his union activities" and, when Caldwell said he thought West was "on the fence" with respect to the Union, Flexman said that he "had evidence to the contrary" and, because of that, he would have to put West "back on the bench," that is, demote him (P. A. 1072; B. A. 241).[7] At about this same time, Employee Dorn told Flexman that he had been invited to attend a Union meeting but before doing so wanted to know where he "stood" with the Company with respect to job security. Flexman told Dorn that "if you stick with the firm at this time you will be well taken care of" (P. A. 1018; B. A. 228–229, 233–234), and that he might attend the meeting, find out who belonged, and let Flexman know (P. A. 1018–1019; B. A. 230). Flexman then, again citing the contrasting examples of Foremen Anderson and West, said that Anderson had been "loyal" to petitioner (P. A. 1019; B. A. 231, P. A. 485, 486),[8] but that since West had joined the Union he was "no more use to us," was "creating an unhealthy atmosphere in the department," and that Flexman was "going to get rid of him" (P. A. 1072; B. A. 231).

The petitioner further interfered with, coerced, and restrained its employees in the exercise of their organizational rights by authorizing its foremen to

[7] Foreman West was discriminatorily demoted a month later (*infra*, pp. 16–19).

[8] The evidence shows that Flexman further stated that Foreman Anderson had fought against unionization and "was well taken care of for it" (B. A. 231, P. A. 485, 486).

combat the Union's organizing efforts and instructing its foremen, from 1937 until approximately the time of the hearing herein, as to petitioner's "anti-union philosophy and arguments" (P. A. 54, 1027–1030, 1034, 1035), and as to how they should represent to the employees the company's viewpoint with respect to the Act and the question of unions generally (P. A. 1027–1030; 272–275, 390–398, 400, 444–448, 458–460, 491–493, 602–603, 679–683, 688–689, 714–718, 725–727, 745–753, B. A. 10–12, 15–17, 26–30, 309). The foremen were told that they should gain the workers' "confidence" and then "explain" to them "that they were better off at Donnelley's without a union", that they would be "worse off if they join the union than they are now", that the foremen should "point out" to the employees that they would be "foolish" to join a union (P. A. 1029–1032; B. A. 15–17, 18–19, 32–33, P. A. 397), and that they should tell the employees to compare the "advantages" of working at Donnelley's and working in a union shop (P. A. 1028–1029; 273–275, 396, 683, 688–689, 704, 714, 727, 749–753).[9]

The foremen, accordingly, actively participated in petitioner's anti-union campaign. In 1939, when Flexman was a foreman (P. A. 1014; B. A. 222),[10]

[9] The evidence shows that the foremen were further instructed to tell the employees that they would make less money, suffer lay-offs, and "lose their annuities" under union conditions (B. A. 16–17, 18–19, 32–33, P. A. 397), and that petitioner would like to "keep things as they are now" (P. A. 752, B. A. 17).

[10] The Trial Examiner's Intermediate Report, as printed in the record (P. A. 1014), inadvertently states the date as 1937.

he asked Employee Dorn to persuade another employee to withdraw from the Union, and later "congratulated" Dorn upon the success of his mission (P. A. 1014; B. A. 222–224). Other foremen repeatedly told employees that they were a "bunch of damn fools", were "making a mistake", and "wouldn't get any place" by joining or supporting the Union (P. A. 1020, 1025; B. A. 65, 70, 81–82, 207–208), that they would be "suckers" to hand out money "for stuff like that" (P. A. 1021; B. A. 147–148, 151–152), that they had gone "union nuts" (P. A. 1024; B. A. 116), were "unpatriotic" (P. A. 996; 177–186, 689–692),[11] would not gain any benefit from unionizing Donnelley's but would lose benefits (P. A. 1021, 1022, 1024, 1025; B. A. 75, 81–82, 118, 120–121, 129, P. A. 662), and indeed were jeopardizing their jobs (P. A. 1024–1025; B. A. 129, 131–134, 112). The Union and its leaders were characterized by foremen, in conversations with employees, as "racketeers," "Dagos" and "no damned good," and as being primarily interested in getting "their fingers into your pockets" (P. A. 1020, 1022,

[11] The reference to patriotism was but a variation of statements by President Littell and Superintendent Busby, made to employees at various times in 1942, that unionism was a "European" "class system" foreign to American ways (P. A. 994–995; 78), that our soldiers were "fighting to defend democracy" and the right "to live * * * and work as we please, without paying dues" or "tribute" to anyone (P. A. 995; 78–79, 81, 83), and that the employees should "preserve for our boys in the service all of the things they are fighting for" (P. A. 995; 79, 81, 83, 418–419).

1024; B. A. 74–76, 196, 201).[12] One employee was urged to discourage others from joining the Union (P. A. 1024; 604–605).

In addition to the foregoing, petitioner's higher supervisors such as Superintendent Busby, Department Manager Flexman, and various department heads, engaged in extensive questioning of ordinary employees, as well as of foremen, between 1937 and 1943, concerning their union activities and the progress of the Union in organizing the employees (P. A. 1007–1010, 1017, 1019, 1020, 1023, 1031–1032, 1037–1038, 1071, 1072; B. A. 14–15, 18–19, 22–23, 59–62, 67–69, 105–107, 111, 161–163, 174, 184, 186, 213, 214, 230–232, 239–241, 284–285, P. A. 188, 596). And the foremen themselves embarked upon a program of wholesale questioning of employees concerning their union activities and the status of the Union in the plant (P. A. 1020–1023, 1025, 1031, 1037–1038; B. A. 74, 76–77, 84–85, 94–95, 100, 115, 116, 126, 138–139, 179–180, 187–188, 196–197, 206–207, 222, P. A. 661, 697, 739), which was encouraged not only by the conduct of Busby and other top supervisors described immediately above, but by Busby's action in receiving reports from the foremen containing information they had gathered (P. A. 1030–1031, 1039; 302, 366–367, 374–379, 380–381, 399–400, 402–403, 454–455, 619–620, 673, 677, 697–702, 736, B. A. 59–60). Information which was accumulated as a result of this program of inquiry was transmitted by Busby and other high-ranking supervisors to

[12] The record contains numerous similarly disparaging remarks by foremen (B. A. 86–87, 100–101, 141–142).

petitioner's executives (P. A. 54, 1038–1039; B. A. 528–529, P. A. 124–127, 251–256, 366–375, 380–381, 402–403, Tr. 2132–2134).[18]

Finally, petitioner sought further to intimidate its employees against organizing by repeatedly representing to them, not only that unionization would be futile, but that it would be detrimental to their interests. Petitioner asserted that it could not accept certain work if the employees were unionized because it could not "rely on the help" (P. A. 1008; B. A. 66, P. A. 335–336); that the Company would have less work for its employees because of higher production costs (P. A. 1006–1007, 1015; B. A. 161, 176, 184, 190, 192, 198, 201–202, 209–210, 227, P. A. 188, 189, 329–330, 483–484), would be compelled to abolish the minimum work-week (P. A. 1007, 1008, 1011; B. A. 86, 182, 184, 190, 192, 194, 210–211, 214, 230, 253, P. A. 86–87, 88, 91, 313, 330, 331, 487–488), would have to adopt the practice of laying off employees during slack periods (P. A. 1007, 1008, 1011; B. A. 146, 184, 190, 197–198, 201–202, 209–210, 227, P. A. 82, 84, 86–92, 192, 194, 314, 487–488), and intimated that petitioner might go bankrupt if the employees persisted in organizing (P. A. 1008; B. A. 209–211 P. A. 333–334). Similarly, petitioner represented that the payment

[18] Petitioner's executives received from Busby both written and oral reports with respect to union meetings held, how many Donnelley employees attended, and the nature of the business transacted at the meetings (P. A. 1037–1039; B. A. 528–529, P. A. 124–127, 370, Tr. 2132–2134).

of union dues was unnecessary and foolish (P. A. 993, 995, 1009; B. A. 67–68, 164, 185–186, P. A. 77–78), that workers who refused to join the Union would "reap the harvest" if the Union called a strike (P. A. 1015–1016; B. A. 220, 227–228, 284), that petitioner would never enter into a closed-shop agreement and that, since the Union always insisted upon a closed-shop, it was doubtful if petitioner and the Union could ever negotiate an agreement (P. A. 997–1000; 91–93, 315, 954–956, 959, 960, 961, B. A. 27, 163). On two occasions Superintendent Busby went further and asserted, in the presence of union-member employees, that petitioner would never negotiate with the Union (P. A. 1011–1012; 283–284, B. A. 506–507, Tr. 1186–1187).

On April 15, 1943, Walter West was summarily demoted from a supervisory position as foreman on the night shift to a non-supervisory position at a reduction in pay of $14.00 per week (P. A. 1073, 1079; B. A. 272–273). West had worked for petitioner for about nine years (P. A. 1065; B. A. 270–271). He had been a foreman since 1940 (P. A. 1065; 774). Petitioner recognized him as a highly competent and valuable employee and had consistently rewarded him for outstanding work (P. A. 1065–1066; B. A. 272–274, 386–388, 526–527, Tr. 1529). He received a salary increase as late as July 1942 (P. A. 1066; 198–200). In December 1942, West signed a Union authorization card (P. A. 1071; B. A. 287–288, 308–309). That same month

Department Manager Flexman questioned West as to the number of men under him who had joined the Union (P. A. 1071; B. A. 284–285), and warned him that Superintendent Busby felt that West had "too many union friends" and "was keeping bad company" (P. A. 1071; B. A. 285).

Sometime in February 1943, petitioner unsuccessfully tried to persuade West to accept a non-supervisory position on the day shift (P. A. 1072; B. A. 286–287). After West became a full fledged member of the Union in March 1943 (P. A. 1071; B. A. 308–309),[14] Department Manager Flexman openly declared to other employees that he was going to demote West because of his union activities (*supra*, p. 11) but would "wait until the opportunity presents itself" (P. A. 1072; B. A. 231, 241). Shortly thereafter, on April 1, 1943, Flexman was informed by an anonymous telephone call that West had been smoking in a film storage room in violation of a Company rule (P. A. 1073, 1075; B. A. 432–434, P. A. 864, 868). About a week later Flexman, upon Superintendent Busby's instructions, began gathering proof that West had thus violated the no-smoking rule (P. A. 1073; 860–861, B. A. 319, 322–323), which was by no means strictly observed (P. A. 1076, 1077, 1078; B. A. 306–307, P. A. 891–892, B. A. 294–303, 305–306, 334–342, 439–440). West was not consulted (P. A. 1073–1074; P. A. 862–

[14] The Intermediate Report of the Trial Examiner, as printed in the record (P. A. 1071), inadvertently states the date as March 1934.

863).[15] On April 15, Flexman reported the results of his investigation to petitioner's top officials, who thereupon instructed Flexman to obtain affidavits from the employees who had knowledge of West's smoking and then to demote West (P. A. 1073; B. A. 428–430), despite the fact that the usual punishment for such misconduct was a week's lay-off without pay (P. A. 1076, 1078; B. A. 306–307, P. A. 891–892). Flexman carried out his instructions accordingly, demoting West that very day, and mentioning the smoking incident to him then, for the first time (P. A. 1073–1074; 767–770, 861–863, B. A. 290). Later the same day, Flexman told an employee that West was a good worker but that the Company "could not have all that union agitation going on around here," and that the "next man would be a man of character that all the fellows would look up to" (P. A. 1079; B. A. 256–257).[16]

Upon the immediately foregoing facts, the Board concluded (P. A. 61, 1079), that West's violation of the no-smoking rule was merely a pretext[17] and that petitioner, in fact, demoted West primarily

[15] Employees who were questioned on the matter were asked not to mention the inquiries to West (B. A. 255, P. A. 862–863).

[16] Flexman admitted that he believed that the man who succeeded West as foreman was not in favor of the Union (B. A. 388–389, 468–469).

[17] The Board rejected, as unsupported by the evidence, petitioner's claim that West was delinquent, in other respects, in the performance of his duties as foreman (P. A. 1067–1071), and its claim that this alleged fact, in part, motivated petitioner in demoting West (P. A. 1071, 1079).

because of his union affiliation and activities, in violation of Section 8 (3) and (1) of the Act. Upon all of the evidence, the Board concluded, also (P. A. 50–56, 1039, 1097–1098), that petitioner had engaged in a course of conduct which interfered with, restrained, and coerced its employees in the exercise of their rights, in violation of Section 8 (1) of the Act.

On the basis of the foregoing findings, the Board ordered petitioner to cease and desist from its unfair labor practices, to offer reinstatement with back pay to Walter West, and to post appropriate notices (P. A. 61–63b).

Petitioner filed in the court below a petition to review and set aside the Board's order (P. A. 1–43). The Board answered, requesting enforcement of its order (P. A. 44–49), and, on June 12, 1946, the court handed down its opinion enforcing the Board's order in full (B. A. 532–542). On August 12, 1946, the court denied a petition for rehearing (B. A. 575), filed by petitioner (B. A. 544–570), and on September 11, 1946, the court entered a decree in conformity with its opinion (B. A. 575–579).

ARGUMENT

1. No question of general importance is presented by petitioner's contention (Pet. 6–9, 24–25) that evidence is lacking to support the Board's findings, sustained by the court below, that petitioner interfered with, restrained, and coerced its employees, and discriminatorily demoted West. The Board

found that petitioner, through Plant Superintendent Busby and Department Manager Flexman, threatened employees that petitioner would retaliate against them if they supported the Union, that an employee who went on strike would lose his job, and that activity in behalf of the Union would not only prevent an employee from receiving otherwise deserved recognition, but would result in the penalty of demotion (*supra*, pp. 9–12). That such direct threats of economic reprisal against employees for exercising their right of self-organization constitute, in themselves, violations of Section 8 (1) of the Act is, of course, not open to question.[19] The court below in this case (P. A. 533–539) and courts uniformly have so held, and petitioner may not avoid responsibility for its conduct by labelling the threats of its high officials as "personal conversation" (Pet. 19–22).

The Board further concluded that petitioner's course of conduct in opposition to the Union was properly viewable only as a whole, and against the background of petitioner's notorious anti-union policy prior to the advent of the Act, a policy the implementation of which petitioner subsequently modified but never abandoned. The Board's conclusion was justified. Even apart from the outright threats of retaliation against employees, peti-

[19] The Board found (P. A. 55) that petitioner's threats to its employees constituted unlawful conduct, in themselves, without regard to the balance of petitioner's entire course of conduct.

tioner's unremitting campaign against the Union was characterized by acts which have become accepted evidence of unlawful interference and coercion. Misleading statements as to employees' rights under the Act,[19] statements that organizing activities by employees are unpatriotic,[20] statements disparaging a union or its leaders,[21] warnings as to the loss of jobs and job benefits if employees organize[22] and as to the general futility of employees' exercis-

[19] *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 339; *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. 2d 589, 591 (C. C. A. 7).

[20] *National Labor Relations Board* v. *Eclipse Moulded Products Co.*, 126 F. 2d 576, 580 (C. C. A. 7); *North Carolina Finishing Co.* v. *National Labor Relations Board*, 133 F. 2d 714, 716 (C. C. A. 4), certiorari denied, 320 U. S. 738; *National Labor Relations Board* v. *Condenser Corp. of America*, 128 F. 2d 67, 81 (C. C. A. 3); *National Labor Relations Board* v. *Air Associates*, 121 F. 2d 586, 592 (C. C. A. 2).

[21] *Humble Oil Co.* v. *National Labor Relations Board*, 140 F. 2d 777, 778 (C. C. A. 5); *National Labor Relations Board* v. *Aintree Corp.*, 132 F. 2d 469, 471 (C. C. A. 7), certiorari denied, 318 U. S. 774; *National Labor Relations Board* v. *Reeves Rubber Co.*, 153 F. 2d 340, 341 (C. C. A. 9); *National Labor Relations Board* v. *Fairmont Creamery Co.*, 143 F. 2d 668, 669 (C. C. A. 10), certiorari denied, 323 U. S. 752.

[22] *National Labor Relations Board* v. *Brezner Tanning Co.*, 141 F. 2d 62, 63 (C. C. A. 1); *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893, 895 (C. C. A. 2); *Big Lake Oil Co.* v. *National Labor Relations Board*, 146 F. 2d 967, 969 (C. C. A. 5); *National Labor Relations Board* v. *American Pearl Button Co.*, 149 F. 2d 311, 314–315 (C. C. A. 8); *National Labor Relations Board* v. *Litchfield Mfg. Co.*, 154 F. 2d 739, 741 (C. C. A. 8); *National Labor Relations Board* v. *Fairmont Creamery Co.*, 143 F. 2d 668, 669 (C. C. A. 10), certiorari denied, 323 U. S. 752.

ing their statutory right to organize,[23] as well as surveillance and questioning of employees with respect to their union activities,[24] are well-recognized forms of interference, restraint and coercion, in violation of Section 8 (1) of the Act.

And, in the instant case, the nature of petitioner's elaborate and deliberate campaign to defeat the Union, we submit, heightened the coercive effect of its conduct. For example, petitioner's use of its foremen as anti-union agents demonstrated a glaring contempt for the statutory guarantee of the employees' freedom of action in matters relating to organization, and resulted in the severest pressure being brought against the employees. Petitioner's contention that it is not responsible for the coercive conduct of its foremen because the foremen themselves were as eligible for membership in the Union as were the rank and file workers (Pet. 26–29) is

[23] *National Labor Relations Board* v. *Moench Tanning Co., Inc.*, 121 F. 2d 951, 952 (C. C. A. 2); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 649 (App. D. C.); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 813 (C. C. A. 7); *Reliance Mfg. Co.* v. *National Labor Relations Board*, 143 F. 2d 761, 762 (C. C. A. 7); *Gamble-Robinson Co.* v. *National Labor Relations Board*, 129 F. 2d 588, 589–590 (C. C. A. 8). Cf. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 385.

[24] *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518; *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 535; *National Labor Relations Board* v. *Collins & Aikman Corp.*, 146 F. 2d 454, 455 (C. C. A. 4); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 813–814 (C. C. A. 7); *National Labor Relations Board* v. *Armour & Co.*, 154 F. 2d 570, 577 (C. C. A. 10), certiorari denied, No. 375, this Term.

manifestly without merit. Sustaining the Board's rejection of this contention (P. A. 53–54, 1026–1036), the court below properly held (B. A. 538) that when "petitioner sent [the foremen] * * * out on missions of anti-unionism, the petitioner became responsible for what they said and did. The foremen were then speaking for their employer as its representatives, and the petitioner was liable for what they said and did within the scope or apparent scope of their authority. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80 * * * *H. J. Heinz Company* v. *National Labor Relations Board*, 311 U. S. 514 * * * *National Labor Relations Board* v. *Fitzpatrick & Weller, Inc.*, 138 F. 2d 697, 698. The rank and file of petitioner's employees had a right to assume that the foremen spoke for the petitioner, especially in the light of petitioner's long standing antagonism to unions * * *."

Similarly, petitioner's extensive questioning and surveillance of its employees with respect to union matters, which embraced the gathering of information and the reporting of it to petitioner, represents a flagrant transgression upon its employees' right to freedom of organization, which formed an integral part of petitioner's anti-union program and entailed the services of petitioner's highest officials as well as its foremen. Petitioner cannot escape responsibility for its conduct in this respect by the simple contention that its questioning and surveillance was not developed into a *formal* system of

inquiry and report (Pet. 31–35),[25] or that the information obtained was never "used" (Pet. 33, 34–35).[26] And regardless of whether, as petitioner contends (Pet. 12, 17, 33), questioning of employees concerning their union activities constitutes, in itself, an unfair labor practice, there can be no doubt but that the questioning in which petitioner engaged, occurring, as it did, in a context of coercive anti-union pressure otherwise exerted upon the employees, constituted part of petitioner's course of unlawful interference, restraint, and coercion. See cases cited, *supra*, p. 22, n. 24.

Nor does the case involve, as petitioner contends (Pet. 7–8, 11–14, 18–19, 24–25), the issue of free speech under the First Amendment. The facts set forth (*supra*, pp. 3–19) show that the Board was fully justified in concluding that petitioner's whole course of conduct constituted interference, restraint, and coercion. Such conduct is not constitutionally privileged merely because it involves the use of oral and written statements. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477–478. Where, as here, the employer's statements are either inherently coercive, or exert a coercive force by reason of the "whole

[25] See *National Labor Relations Board* v. *Standard Oil Co.*, 124 F. 2d 895, 908 (C. C. A. 10).

[26] *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 813, 814 (C. C. A. 7); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 647 (App. D. C.); *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 50 (C. C. A. 3).

complex" of the employer's anti-union activities, no question of free speech under the First Amendment is involved. The *Virginia Electric & Power* case, *supra; Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 538–539; *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 386; *National Labor Relations Board* v. *American Laundry Machinery Co.,* 152 F. 2d 400, 401 (C. C. A. 2); *National Labor Relations Board* v. *M. E. Blatt Co.,* 143 F. 2d 268, 273–275 (C. C. A. 3), certiorari denied, 323 U. S. 774; *National Labor Relation Board* v. *Peterson* (C. C. A. 6), decided October 16, 1946; *Reliance Mfg. Co.* v. *National Labor Relations Board,* 143 F. 2d 761, 763 (C. C. A. 7).

2. Petitioner contends, principally upon evidentiary grounds (Pet. 6–9, 11–35), that the Board improperly ordered it to cease and desist (a) from questioning and haranguing its employees concerning their union activities, (b) from maintaining a system of reports on union activities in the plant, and (c) from instructing foremen and supervisors to make statements to its employees concerning labor organizations which transgress the provisions of the Act.

We have already shown (*supra,* pp. 11–15) that there was substantial evidence supporting the Board's findings that petitioner's persistent questioning of its employees concerning their union activities, maintaining reports on their union activities, and instructing and authorizing foremen and

supervisors to join in petitioner's anti-union campaign, constituted part of petitioner's whole course of unlawful interference and coercion. Insofar as petitioner's attack upon the Board's order is based upon a claim of lack of substantial evidence supporting the subsidiary findings upon which the order is based, therefore, it must fail.

The only other respect in which petitioner challenges the Board's order is that the provision restraining petitioner from instructing its foremen to engage in unlawful anti-union conduct is invalid because uncertain (Pet. 30–31). This provision of the order, as the statement of facts shows (*supra*, pp. 12–14), is also nothing more than a specification of part of the course of unlawful conduct petitioner has engaged in in the past, and from which it is enjoined in the future. Its inclusion in the order does not add to the prohibitions of the broad cease and desist clause (Par. 1 (c) of the order; P. A. 62),[27] to which petitioner does not object except upon evidentiary grounds (Pet. 8). It thus renders the Board's order, generally, more specific and definitive, and not less so, as petitioner contends. This provision of the order, therefore, is entirely proper.

CONCLUSION

The decision below is correct and there is neither a conflict of decisions nor any question of general

[27] Paragraph 1 (c) of the order, through a typographical error, appears as the second paragraph designated "1 (b)" in the printed record (P. A. 63).

importance. The petition for a writ of certiorari should, therefore, be denied.

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JANUARY 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce, employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

SEC. 10. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

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